

STATUS OF DETAINEES

RELEASED IN PART
B1, 1.4(D)Background

(U) The 1949 Geneva Convention on POWs applies to the conflict with the Taliban in Afghanistan. The Taliban's members are not, however, entitled to POW status because the Taliban does not have a proper military command, does not sufficiently distinguish itself from civilians, and systematically violates the laws and customs of war. The Geneva Convention does not apply to al Qaeda because it is not a High Contracting Party to the Geneva Conventions. Even if it were, it fails to meet any of the four criteria applicable to lawful forces (subject to military command, wear uniforms, carry arms openly, and follow laws and customs of war).

- (U) The US does not need to convene Article 5 tribunals to make status determinations because there is no doubt about the detainees' status. If doubt should arise in any individual case, the US will revisit the decision.
- (U) Even if there were doubt, Article 5 does not require the US to convene tribunals unless and until such time as it stops providing the basic protections of the Convention, e.g., basic humane treatment.
- (U) The US is providing basic humane treatment and other similar protections. The detainees are also receiving privileges and benefits (e.g., new shoes and clothing, personal toiletries, sleeping pads and blankets, the opportunity to worship, the means to send mail, etc.) that exceed basic protections.
- (U) Article 5 tribunals were designed to prevent low-level arbitrary determinations, e.g., by a corporal in the field, but in this case, the President himself decided on POW status after careful consideration with his top advisers.
- (U) Many European countries are party to Additional Protocol 1 of the 1949 Geneva Conventions -- which establishes a presumption of POW status for detainees -- but the US is not a party. Although we recognize that some Protocol I provisions reflect customary international law (e.g., basic protections under Article 75), this does not include the presumption of POW status.

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